STATE OF MICHIGAN

COURT OF APPEALS

TERI HOLLEY, Individually and as Next Friend of GABRIELLE RIGGS, Minor,

Plaintiff-Appellee,

and

CHRIS RIGGS,

Plaintiff,

v

FREDERICK MUMFORD,

Defendant-Appellant,

and

DEBORAH BOULAHANIS,

Defendant.

UNPUBLISHED
July 8, 2003

No. 232047
Washtenaw Circuit Court
LC No. 00-000008-NO

Before: Bandstra, P.J., and Gage and Schuette, JJ.

PER CURIAM.

Defendant Frederick Mumford appeals as of right from a judgment in favor of plaintiffs following a civil jury trial. We affirm.

In a separate criminal action, Mumford pleaded no contest to sexually abusing a three-year-old girl and was sentenced. Approximately seventeen months later, plaintiffs Teri Holley and Chris Riggs, the victim's parents, filed this civil suit against Mumford, alleging one count of battery regarding their daughter, one count of intentional infliction of emotional distress regarding themselves, and one count of fraudulent transfer, claiming that Mumford had quitclaimed real estate to his daughter, defendant Deborah Boulahanis (now Deborah Somers), for the specific purpose of preventing the property from being used to satisfy a civil judgment in favor of plaintiffs. During the trial, Chris Riggs withdrew his intentional infliction of emotional distress claim. The jury awarded $850,000 on the battery count and $10,000 on the intentional

infliction of emotional distress count, and found that the property transfer was fraudulent and should be set aside. This appeal followed.

Mumford first argues that the trial court's decision to adjourn the trial for lunch while knowing that Mumford's expert witness might be unavailable after lunch was an abuse of discretion. See, e.g., *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). We disagree. Trial on the day in question began promptly at 8:05 a.m. The trial court's decision to adjourn for lunch nearly four and one-half hours later, at 12:34 p.m., does not evidence the perversity of will, defiance of judgment, or exercise of passion or bias necessary to constitute an abuse of discretion. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). This is especially true where, as here, no formal objection to the trial court's decision to adjourn was made.[1]

Mumford next contends that the jury finding that he fraudulently transferred his real estate to his daughter was against the great weight of evidence and should, therefore, be set aside. However, Mumford did not move in the trial court for a new trial. Absent a motion for new trial, a challenge to a verdict on the ground that it is against the great weight of the evidence is not preserved for appellate review. *Hyde v University of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997). Failure to raise the issue by the appropriate motion waives the issue on appeal unless failure to consider the issue would result in a miscarriage of justice. *Id*. As explained below, because the evidence was sufficient to support the jury's verdict, a miscarriage of justice will not result from our failure to review this issue.

It is well settled that a jury's verdict should not be set aside if there was competent evidence to support it. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). Thus, when a party claims that a jury's verdict was against the great weight of the evidence, we may overturn that verdict "only when it was manifestly against the clear weight of the evidence." *Id*.

Pursuant to the Uniform Fraudulent Transfers Act (UFTA), MCL 566.31 *et seq*., a transfer is fraudulent if made "[w]ith the actual intent to hinder, delay, or defraud any creditor of the debtor." MCL 566.34(1)(a). MCL 566.34(2) states that, in determining whether such actual intent existed, "consideration may be given" to whether a number of specifically enumerated factors are present. These factors include whether:

> (a) The transfer or obligation was to an insider.
>
> (b) The debtor retained possession or control of the property transferred after the transfer.
>
> (c) The transfer or obligation was disclosed or concealed.

---

[1] Although defense counsel did indicate his "belief" that the witness would not be available after lunch, no formal objection to the trial court's decision to adjourn was ever registered by the defense.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all of the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. [MCL 566.34(2).]

We agree with plaintiffs that the factors set forth in MCL 566.34(2) constitute a "non-exclusive list" of factors relevant to a determination of "actual intent." Indeed, MCL 566.34(2) expressly provides that the factors specifically enumerated therein are simply "among" those to which "consideration may be given." See also, *Bentley v Caille*, 289 Mich 74, 77-78; 286 NW 163 (1939) (actual intent is to be determined "by a consideration of the circumstances surrounding the transaction"). We similarly agree that the UFTA does not require that any set number of these factors be present before it may properly be determined that an actual intent to hinder, delay or defraud a creditor existed. To the contrary, the act merely provides that in determining whether the requisite intent existed, "consideration may be given to . . . whether 1 or more" of these factors are present. MCL 566.34(2). We note, however, that a "'concurrence of several [of these factors] will always make out a strong case'" in support of fraudulent intent. *Bentley*, *supra* at 78, quoting *Timmer v Pietrzyk*, 272 Mich 238, 242; 261 NW 313 (1935). In the present case, plaintiffs presented evidence in support of a number of these factors.

First, it is not disputed that the transfers at issue here were made to Mumford's daughter, – an "insider" within the meaning of MCL 566.34(2)(a). See MCL 566.31(g). Second, although not overwhelming, there was also evidence that Mumford retained control over the properties after the transfer. MCL 566.34(2)(b). At trial, his daughter testified that Mumford had instructed her to permit his girlfriend to remain living at one of the transferred properties without paying rent, and that she had complied with these instructions. Mumford himself also testified that when released from prison he intended to return to that property to live with his girlfriend, "if I still own the properties." Mumford also acknowledged at trial that, in his answer to plaintiffs' complaint, filed more than eleven months after the transfers, he claimed that the property transfers had been made so that his daughter could more easily sell the properties on his behalf in order to raise money for defense of the criminal charges pending against him at the time of the transfers.

There was also evidence that the transfers were made in contemplation of being sued by plaintiffs. MCL 566.34(2)(d). The daughter of Mumford's girlfriend testified that, during a conversation with Mumford concerning the police investigation into the molestation in October 1998, Mumford indicated that he was certain he would be "framed" by the police and that the victim's mother, plaintiff Teri Holley, would then sue him and "get everything." That Mumford's largest assets were sold in February 1999, just three months after his arrest in that case, reasonably supports the inference that he anticipated a lawsuit at the time of the transfers.

Moreover, there was evidence at trial indicating that the properties transferred by Mumford held a value totaling up to $368,000. Even excepting the mortgages on these properties, the evidence indicates that the conveyances constituted a transfer of nearly eighty percent of Mumford's assets.[2] This evidence is sufficient to support that the challenged transactions constituted a transfer of "substantially all" of Mumford's assets. MCL 566.34(e).

Finally, it was not disputed that the consideration received by Mumford for these transfers, i.e., one dollar per property, was not "reasonably equivalent to the value of the asset[s] transferred." MCL 566.34(h). While both Mumford and his daughter testified that, given Mumford's inability to manage the properties from prison, the transfers were made simply as an early inheritance, the jury obviously rejected their testimony and, in the face of the conflicting evidence, this Court may not substitute its judgment for that of the jury. *Ellsworth*, *supra* at 194; *Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943). Accordingly, we conclude that the evidence regarding the circumstances surrounding the transfers was sufficient to permit the jury to infer an actual intent to hinder, delay, or defraud the plaintiffs. MCL 566.34(1); *Bentley*, *supra*. Consequently, no miscarriage of justice being shown, defendant has waived this issue on appeal. *Hyde*, *supra*.

Mumford next argues that the trial court erred in denying his motion for summary disposition, in which he asserted that plaintiffs had failed to state a cause action or to provide proper notice of the basis of their claim because, in seeking to set aside Mumford's real estate transfers to his daughter as fraudulent, plaintiffs relied upon the then recently repealed Uniform Fraudulent Conveyances Act (UFCA), MCL 566.11 *et seq*.[3] We review a trial court's ruling on a summary disposition motion de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When stating a claim, the pleader must provide "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1).

Although the UFCA was repealed less than a week before the complaint was filed, it was simultaneously replaced by the substantively similar UFTA.[4] Construing the allegations in a light most favorable to the non-moving party, as we are required to do, the allegations were

[2] The evidence indicates that, other than the real estate at issue, Mumford possessed only a bank account held jointly with his daughter, which was valued at $50,000 at the time of trial.

[3] The UFCA was repealed by 1998 PA 434, § 13, effective December 30, 1998. Plaintiffs complaint was filed January 4, 2000, just five days later.

[4] See, generally, 1998 PA 434, effective December 30, 1998.

"specific enough to reasonably inform the adverse party of the nature of the claims against him," *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). The complaint sufficiently informed Mumford of what he was alleged to have done and who his actions had allegedly damaged. The only aspect of the claim that he remained arguably uninformed about was the specific statute forming the basis of plaintiffs' claim, and this lack would have been easily remedied by his attorney reading the new statute. Moreover, had the trial court granted Mumford's motion for summary disposition, plaintiffs could have applied for leave to amend to include the new statute and it would probably have been granted. *Dampier v Wayne Co*, 233 Mich App 714, 721; 592 NW2d 809 (1999). Thus, we decline to reverse on this basis, as to do so would be to condone a fruitless and duplicative exercise.

Mumford next contends that the trial court should not have admitted evidence of a recorded telephone conversation between himself and plaintiff Chris Riggs, in which Mumford admitted sexual abusing the victim, because the tape was obtained by the police in violation of his Fourth Amendment right to be free from unlawful searches. However, while defense counsel objected to portions of the tape on a hearsay basis, he did not object on the constitutional basis raised in this Court. Therefore, this issue is not preserved for appeal. See *Kubisz v Cadillac Gage, Inc*, 236 Mich App 629, 637; 601 NW2d 160 (1999). Accordingly, we review the record for plain error affecting Mumford's substantial rights, i.e., error that affected the outcome of the case. *Shinholster v Annapolis Hosp*, 255 Mich App 339, 350-351; 660 NW2d 361 (2003); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). Here, reversal is not required because the error – if any – did not affect Mumford's substantial rights. Even without the evidence concerning the subject telephone call there was evidence that, at various periods of time both before and after his arrest, Mumford had confessed to the abuse to a number of other individuals. Given this evidence, it cannot be said that evidence of his telephone conversation with Chris Riggs affected the outcome of the trial. *Shinholster*, *supra*.

Citing MRE 803A, the tender-years exception to the hearsay rule, Mumford next argues that testimony concerning the victim's statements regarding his acts of sexual abuse should not have been admitted at trial. This rule, however, expressly applies only to criminal and delinquency proceedings. See MRE 803A(4). Accordingly, we decline to reverse on the basis of this issue.

Finally, Mumford argues that the trial court erred when it failed to grant a mistrial on the basis of statements concerning the criminal action against him and his resulting plea of no contest. Again, we disagree. Whether to grant a mistrial in a civil action is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion resulting in a miscarriage of justice. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999). A mistrial is warranted only when the prejudice resulting from an error threatens the fundamental purposes of accuracy and fairness, *In re Flury Estate*, 249 Mich App 222, 229; 641 NW2d 863 (2002), and a curative instruction would not cure the prejudice, *Persichini*, *supra* at 636-637.

In both instances in which the plea and its surrounding circumstances were mentioned, the remarks were inadmissible under MRE 402 and MRE 410. However, after the first instance, the trial court agreed to give a limiting instruction and in fact instructed the jury that statements made by the attorneys were not evidence. After the second mention of the plea, the court struck the mention on objection from defense counsel and later reminded the jury that it should not

consider any testimony to which an objection was sustained. Therefore, any potential prejudice resulting from the subject remarks was cured. *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 133 n 5; 492 NW2d 761 (1992); see also *Craig v Oakwood Hosp*, 249 Mich App 534, 561; 587 NW2d 498 (2002) (jurors are presumed to follow their instructions). Accordingly, the trial court did not abuse its discretion in failing to grant a mistrial. *Perisichini, supra*.

We affirm.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Bill Schuette